In the Supreme Court of the United States.

OCTOBER TERM, 1901.

F. S. BOWKER, MANAGING OWNER OF THE schooner "William H. Davenport," appellant,
v.
THE UNITED STATES, OWNER OF THE light-house tender "Azalea." } No. 247.

BRIEF FOR APPELLEE.

The question involved in this appeal is not unimportant. While it has been variously stated in the five questions certified by the lower court, yet in its last analysis the question reduces itself to this:

Is the immunity of the United States from suit in an action sounding in tort—an immunity which rests on considerations of public policy, and which this court has said can not be waived except by express consent of Congress—waived by or lost to the Government, if the Government brings an action against the private litigant for whose benefit the waiver is claimed?

Or, stating the question in another form:

Can the defendant in a suit brought in a court of admiralty by the United States secure by medium of a cross bill relief against the Government, which he could not ask through the medium of an original libel?

Stated even more broadly, the underlying question is, whether the Government can avail itself of its unquestioned right to litigate only on condition of forfeiting its immunity from adverse suit.

In the case at bar it is important to observe the precise nature of the cross bill, and the exact relief for which it prayed. The United States had filed a libel against the three-masted schooner *William H. Davenport*, and claimed damages "to the amount of $5,000 for injuries sustained by its light-house tender *Azalea* in a collision with the said schooner *Davenport*." The gravamen of the libel was a wrong done to the United States by the tortious act of the owners of the schooner in question, and the scope of the legal controversy was, under the libel and answer, necessarily limited to the ascertainment of the single fact whether any injury had been sustained by the *Azalea* by reason of the negligence of the owners of the *Davenport*. To no greater extent did the Government submit itself to the judgment of the court.

The owner of the *Davenport*, having intervened as respondent, and filed his answer, in which he charged that the collision was due to the negligence of those in charge of the *Azalea*, filed a cross bill, in which he made "complaint against the United States of America, owner of the steamer known as the light-house tender *Azalea*, in a cause of collision." The cross libel, after proceeding to detail the cross libellant's version of the collision, prayed as follows:

> Wherefore your libelant prays that a citation, according to the course and practice of

this honorable court in causes of admiralty and maritime jurisdiction, may issue to the said respondents above named, citing and admonishing them to appear and answer all and singular the matters aforesaid, and that this honorable court shall pronounce for the damages, with interests and costs, and will grant a stay of all further proceedings in the action of the said respondent brought by it in this honorable court against the schooner *William H Davenport* by the filing of a libel against said schooner on November 3, 1899, until security be given by said respondent, pursuant to the admiralty rules of the Supreme Court of the United States and the practice of this honorable court, to respond for the damages claimed in this cross libel, and that this honorable court will give to the cross libelant such other and further relief as in law and justice he may be entitled to receive, this said action being a counterclaim arising from the same cause of action for which the original libel was filed against the said *William H. Davenport.*

The cross libel, therefore, specifies a new and distinct cause of action from that set forth in the original libel, and asks for different relief. It is true that the substance of the answer to the original libel and the cross libel are, in effect, the same as to the facts of the collision, but the causes of action are separate and distinct. There could be a complete answer to the original libel which would not carry with it as a necessary conclusion any liability to respond by the libellant; but the cross libel in this case goes further than a

mere defense to the libel, and introduces into the controversy a new and distinct cause of action, namely, the assertion of the liability of the original libellant to respond in damages to the respondent; and while, as a matter of convenience, these two cases, under Admiralty Rule 53, when brought by private litigants, could be consolidated or tried together, yet the causes of action are separate and distinct. Each case has its peculiar pleadings.

In this new cause of action, therefore, the cross libellant makes four prayers:

(1) That the Government shall respond in damages for the wrong done by its servants in an action sounding in tort.

(2) That a citation be issued to compel the United States "to appear and answer all and singular the matters aforesaid."

(3) That the proceedings instituted by the Government in the original and distinct action shall be stayed "until security be given by said respondent (the United States) to respond for the damages claimed in this cross libel."

(4) The general prayer for further relief.

Has this court jurisdiction to grant these prayers? It certainly has none unless it has in some way submitted itself as a party defendant to an adverse suit. It can not be contended that by its original libel it has thus submitted itself to a separate and distinct cause of action. It did not ask the court to determine the question whether its servants, who were sailing the *Azalea*

had negligently inflicted damage upon the *Davenport*, and it neither expressly nor by any reasonable implication waived the immunity which it enjoys on grounds of public policy, and which under the decisions can not be waived except by the express consent of the legislative department of the Government.

It is suggested, however, that the mere fact that the Government appears in a court and asks for redress for a wrong done it, constitutes a waiver of its immunity from suit by reason of a wrong done by it, and this argument, for which no applicable authority is cited, is based upon Admiralty Rule 53, which provides that:

> Whenever a cross libel is filed upon any counterclaim arising out of the same cause of action for which the original libel was filed, the respondents in the cross libel shall give security in the usual amount and form to respond in damages, as claimed in said cross libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given.

The answer to this ingenious argument is twofold.

In the first place it is not in the power of a rule of court to deprive the Government of immunity from suit. It can not deny a litigant an undoubted right to litigate in order to compel him to surrender an unquestioned right of immunity.

In the second place, it obvious that the admiralty rule referred to has no application to the present case, for it is obviously intended to permit a cross bill only in cases where an original libel could be properly

filed. In other words, it can only refer to claims which are legally suable in a cross bill, and can have no reference to cases where, by any reason of the policy of the law, an original bill could not be filed. Nothing could be further from the intention of those who framed the rule than the thought that in giving the respondent in a collision case a right to file a cross bill that it was creating some new right of action which otherwise would not exist. *In other words, the rule in question does not create rights, but simply affects procedure, and simply means that where A sues B, and B has a right to sue A, and both causes grow out of a common transaction, that instead of having two separate actions, B may file a cross bill, and require A to give security even as B has been compelled to give security to meet A's claim. But the entire rule is based upon the assumption that B has an existing right to sue A, and can have no application to a case like the one at bar where B (Bowker) has no legal or suable claim against A (the United States).*

To hold otherwise would impair the immunity from prosecution which is said to rest upon important considerations of public policy, for if this admiralty rule can be construed to give a right to sue the Government which did not theretofore exist, then it must be true that in all equity cases, where equity procedure also provides for cross bills, that whenever the Government goes into a court of equity to ask relief, that the respondent can by cross bill compel the United States to grant other and distinct relief in a matter in which otherwise no original bill could possibly lie. And even at common law, statutes in most

of the States regulating civil procedure in the Federal as well as the State courts, provide that in any common-law action to establish a civil liability, where the defense is a set-off, that the jury may give a certificate in favor of the defendant and against the plaintiff for any amount which it finds the plaintiff owes the defendant. If the appellant's contention in the present case be true, therefore, the United States can not go into a common-law court and sue in an action of debt without subjecting itself to a counter claim, arising, perhaps, out of entirely different circumstances, and making possible a judgment in favor of the defendant and against the Government.

Moreover, if the appellant's contention be sound, that the mere filing of the bill by the Government is a waiver of its immunity from suit, it must follow that it is likewise a waiver of its immunity from execution; for if it subjects itself to the ordinary procedure which adjudicates the rights of private litigants in one respect, then it subjects itself to all, and it would then follow, in the present case, that if the Government by suing the owners of the *Davenport* has thus permitted such owners to sue the Government, and obtain a judgment for damages, it has also so far waived immunity from execution as to permit its offending vessel, in this case a light-ship, to be seized by its own officer, the United States marshal, in execution for the payment of the liability thus established. The salutary rule of public law that the sovereign power may not thus be impleaded or embarrassed by judicial process, either original or final, is well vindicated by imagining, in

the present proceeding, the United States, by its own marshal, seizing a governmental instrumentality that is essential to life, and thus impeding the Government in its operations and subjecting it and its citizens to heavy losses.

The appellant, however, suggests that such is not his purpose, and that he neither wishes the service of process upon the Government, which under the theory of the law compromises its dignity as a sovereign power, nor any process in execution of any judgment which he may obtain. This contention, however, which only finds expression in the brief, which is not a matter of record, is entirely opposed to the specific prayers of the libel. The libel prayed for a citation to compel the appearance of the United States in its own courts to answer the allegation of negligence, and it did ask that the court should "pronounce for damages with interest and costs," which could only mean that the court should enter such decree as would enforce its judgment. Appellants now claim that they ask nothing more than a stay of the original proceedings. But their prayer goes much further, for it asks the court "to grant a stay of all further proceedings * * * *until security be given by said respondent* * * * *to respond for the damages claimed in this cross libel.*"

I submit that the same public policy which protects the property of the Government from seizure or even adverse judgment likewise exempts the Government from the necessity of giving security to pay any judg-

ment against it. No practical distinction is perceivable between the two. If the Government can be compelled to give security for the payment of judgments where its property can not be seized in execution, its operations may be materially impeded in meeting this demand.

The suggestion that the Government in filing its libel thereby waives its immunity from a counterclaim is unsound. It is based upon an erroneous construction of Admiralty Rule 53, for while the Government unquestionably in coming into court submits itself in the assertion of its rights to the rules of practice that there prevail, and in this respect stands on no higher plane than any litigant, it does not surrender an unquestioned right, and no rule of court is intended to have this effect.

It must be remembered, in this connection, that not only has Congress not authorized the Government to waive its immunity in the present proceeding, but on the contrary Congress has expressly refused to permit the Government to be sued in actions sounding in tort. The act of March 3, 1887 (24 Stats., 505), waives the Government's immunity, with respect to the following suits against the United States:

> *First.* All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of any Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, *in cases not sounding*

> *in tort*, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable.

It is a strained and remarkable construction of rule 53, that the Government in asking for relief in one cause of action is by a rule of court compelled to give relief in another cause of action, although Congress has not only failed to permit such relief, but by exception practically forbidden it.

The answer to the first question certified by the learned judge must therefore be that while *the United States in filing its libel submitted itself to the jurisdiction of the court in the particular cause of action which was the subject of its libel, but it did not so submit itself as to the distinct cause of action which is the subject of the cross-libel. Similarly, the United States did submit itself "to the ordinary rules and practice in admiralty," and it can claim no higher right in litigating its cause than any private litigant, but the ordinary rules and practice of admiralty do not pretend to authorize, and are not competent to authorize, an action against the United States sounding in tort.*

It seems hardly necessary to cite cases in support of these well-established principles. These principles are summarized and fully stated in the comparatively recent case of *Belknap* v. *Schild* (161 U. S., 16), in which this court, speaking through Mr. Justice Gray, reviewed all of the authorities and summarized the law applicable to the question. (See pages 16 to 22, inclusive.)

It will be noted that the learned justice cites with approval the case of *United States* v. *McLemore* (4 How., 286); *Hill* v. *United States* (9 How., 386), and *Case* v. *Terrell* (11 Wall., 199), in support of the proposition that, "unless expressly permitted by act of Congress, no injunction can be granted against the United States."

This principle has some application in view of the argument of appellant in the case at bar, that they do not ask either original process, or process in execution, but simply for a stay of proceedings until security be entered by the Government to respond to the cross claim.

A stay of proceedings is not distinguishable from an interlocutory injunction. It is, in effect, an injunction. As the term imports, it stays the hand of the Government in the exercise of its right to litigate. If a final injunction does not lie to restrain the United States from doing any act otherwise legal, for equal reasons it can not lie as an interlocutory order to restrain the Government from prosecuting a suit.

It remains but to consider the cases upon which the appellants seem to place some reliance.

The case of *The Siren* (7 Wall., 152), I submit, supports the Government's contention rather than the appellant's. In that case, Mr. Justice Field said:

> It is a familiar doctrine of the common law that the sovereign can not be sued in his own courts without his consent. The doctrine rests upon reasons of public policy—the inconvenience and danger which would follow from

> any different rule. It is obvious that the public service would be hindered and the public safety endangered if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the Government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They can not be subjected to legal proceedings, at law or in equity, without their consent, *and whoever institutes such proceedings must bring his case within the authority of some act of Congress.* Such is the language of this court in *United States* v. *Clarke* (8 Pet., 444). The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the Government directly, and suits against its property.

In the *Siren* case the *res* was in court by the express consent, indeed, at the instance of the Government itself, which was seeking to make a legal distribution of the *res*, and the court, in adjudicating the question, necessarily considered all the claims against the *res*. But in the case at bar, the *res*, so far as the cross libel is concerned, is not in court. If the Government had brought the *Azalea* into court, and its proceeds were the subject of distribution, a cross libel would be entirely proper, but the Government

has not brought any property into court, but on the contrary has brought the cross libellant's property into court. The distinction between the two cases may be thus illustrated: By the Government's libel, lawfully instituted, the *Davenport* is lawfully in court. If any private litigant, like seamen, for example, had any claim against the *Davenport*, such claim could be asserted, even though it operated to the reduction of the Government's claim in the *res*, for the Government, having brought the *res* in court, can not exclude any lawful claim against the *res*. But as the Government has not brought the *Azalea* into court, and as the owners of the *Davenport* can not under the rule of public policy bring the *Azalea* into court, it is obvious that no claim against the *Azalea* is legally cognizable.

In the case of *The Davis* (10 Wall., 15), personal property of the United States, but not in the possession of one of its officers, was seized by the marshal under a claim for salvage. The pivotal point of this case was that the seizure took place at a time when the goods in question were in the custody of the master of a vessel, not an employee of the United States, and before they were delivered to the representative of the United States. As this court said (p. 21):

> The possession of the master of the vessel was not the possession of the United States. He was in no sense an officer of the Government. He was acting for himself, under a contract which placed the property in his possession and exclusive control for the voyage. His obligation was to deliver possession in New York to

> the agent of the Government. This he had not done when the process was served on the cotton. The marshal served his writ and obtained possession without interfering with that of any officer or agent of the Government.

Under these circumstances it was held that as the *res* had been brought into court without any violation of the Government's immunity from prosecution, that the court could distribute its proceeds among all who were equitably entitled, even though the claim for salvage was adverse to the interests of the Government in the *res*. There is, of course, a vital distinction between that case and the case at bar, where the Government has not brought any of its property within the jurisdiction of the court, and thus subjected its rights to such property to legal adjudication; and therein lies the distinction between the case at bar and all of the cases cited by the learned counsel for appellants. In the latter cases, the Government having voluntarily subjected its property to the judgment of the court, could not complain if the rights of private litigants in said property were thereby judicially recognized. The Davis case, far from modifying the doctrine of *The Siren*, directly affirmed it, as holding—

> that such a lien can not be enforced where, in order to do this successfully, *it is necessary to bring a suit against the United States*, because the doctrine is well established that no suit can be sustained in which the United States is made an original defendant, to be brought into court by process, without some act of Congress expressly authorizing it to be done.

An act of Congress authorizing an adverse claim against the Government is therefore a *sine qua non* to such claim, and the appellant's contention that the action of the district attorney in bringing the original libel against the *Davenport* is a waiver of the Government's right to be protected against adverse suit is therefore without foundation.

In this connection the case of *Carr* v. *United States* (98 U. S., 433) is instructive. In that case the United States filed a bill in equity to quiet the title to certain real estate in its possession. The defendant set up, by way of estoppel, certain judgments in ejectment which had been rendered in the State courts against the officers of the Government, who were in possession of said real estate as agents of the Government, in whose behalf the United States district attorney appeared. It was further shown that additional counsel in these last-mentioned suits appeared for the officers of the Government at the instance and as the representatives of the Secretary of the Treasury. This court, however, held that the Secretary of the Treasury was without authority to waive the Government's immunity from prosecution.

The court say (p. 438):

> It may be contended that the United States consented to have its title determined in these cases, and that such consent was manifested by the employment of the district attorney and additional counsel to aid in the defense. But we do not think that any such inference can be legally deduced from the action of the Secretary

> of the Treasury. He may have deemed it prudent to assist the officers who were sued, without intending to waive any of the rights of the Government. And, in fact, he had no authority to waive those rights. In England it is usual, in the admiralty courts, in proceedings *in rem*, when it is made to appear that property of the Government ought, in justice, to contribute to a general average, or to salvage, for the proper officer of the Government to consent in court that it may take jurisdiction of the matter. As stated by this court in *The Davis* (*supra*), "this consent is given by authority of the King, who thus submits to be sued in his own courts. The liberal exercise of this authority (there) removes the difficulty presented here, where no power to do this exists in any officer of the Government, and prevents any apprehension of gross injustice in such cases in England."

In this case the court, moreover, again emphasizes the fact that the cases of *The Siren* and *The Davis* were both predicated upon the fact that the Government had appeared in court as the claimant of certain property, which had been properly brought within the jurisdiction of the court, and as to which, therefore, all claims could be lawfully asserted.

The only case which apparently suggests that anything less than an act of Congress can waive the Government's immunity from prosecution is the peculiar case of *The Nuestra Senora De Regla* (108 U. S., 92). In that case the steamer was owned by a Spanish corporation. She was seized by the United States Army,

but no judicial proceedings were instituted for her condemnation, about the legality of which there seems to have been some doubt. Subsequently her master chartered her to the United States Army, and under this charter she was used as a Government transport. Subsequently she was delivered to the Navy Department and libeled as a prize. The prize court entered a decree directing that the vessel be restored to the owner, but reserved the question of costs and damages. By agreement between counsel for the Government and the owner, proceedings were stayed, "to the end that all question of damage reserved in the decision of the court may be considered and adjusted by the Government of the United States in the application, and with the concurrence of the Government of Spain." Diplomatic negotiations thereupon followed, and, as the result, the Secretary of State expressed a wish that the question of damages for the unlawful seizure of the vessel should be submitted to the court, which subsequently found an award in favor of the owner. On an appeal to this court the contention was urged, for the first time, by the Government, that it could not be proceeded against without the consent of Congress. The case was a peculiar one by reason of the fact that the submission of the case to the court was the result of diplomatic negotiations with a foreign Government, and, therefore, came under the treaty-making power. To have sustained the contention would have been a flagrant breach of good faith with a friendly power. The court was impressed with this circumstance, and

without broadly affirming that the executive department of the Government can waive the immunity of the Government from prosecution without an act of Congress, yet concluded that it was "too late now to insist that the case is not one of prize," and that, under the peculiar circumstances of the case, having regard for its international character, the executive branch of the Government, charged with plenary power over all foreign relations, could agree to submit that which might become a *casus belli* to the decision of our courts. The case is authority for its own peculiar facts, but is not applicable to ordinary litigation.

That *The Nuestra Señora de Regla* is not authority for the proposition that the Executive, in instituting a suit by the Government, can thereby waive immunity from suit is clearly shown in the later case of *Stanley* v. *Schwalby* (162 U. S., 255), in which it appeared that in an action to try the title of lands, and which was brought by private litigants against officers of the Army, that the district attorney, "purporting to act in behalf of the United States, under the instructions of the Attorney-General, appeared and answered," and these instructions were given "by the Attorney-General at the request of the Secretary of War."

This Court, in an opinion by Mr. Justice Gray, held:

> It is a fundamental principle of public law, affirmed by a long series of decisions of this court, and clearly recognized in its former opinion in this case, that no suit can be maintained against the United States, or against their property, in any court, without express authority of

Congress. (147 U. S., 512. See also *Belknad* v. *Schild*, 161 U. S., 10.) The United States, by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a State in any case. Neither the Secretary of War nor the Attorney-General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers. (*Case* v. *Terrell*, 11 Wall., 199, 202; *Carr* v. *United States*, 98 U. S., 433, 438; *United States* v. *Lee*, 106 U. S., 196, 205.)

* * * * *

The answer actually filed by the district attorney, if treated as undertaking to make the United States a party defendant in the cause, and liable to have judgment rendered against them, was in excess of the instructions of the Attorney-General, and of any power vested by law in him or in the district attorney, and could not constitute a voluntary submission by the United States to the jurisdiction of the court.

In the present case, therefore, even if the district attorney filed the libel against the *Davenport* under instructions from the Attorney-General, and at the request of the Secretary of the Treasury, yet such fact was not intended to waive, and if so intended was not competent to waive, the exemption of the United States from prosecution by reason of an alleged marine tort inflicted upon the *Davenport* by the Government light-house tender.

Much stress is laid by the appellant upon the case of *United States* v. *American Surety Company* (110 Fed., 913). Apart from the fact that this is but a decision of the circuit court, and, therefore, not binding upon this court, the case, as all the cases cited by the appellant, fails to establish his contention. In that case the United States had sued the surety company on a bond. The surety company filed a bill admitting the claim of the Government on this bond, but suggesting that other claimants had also claims upon the bond, and that the sum thereof was not sufficient to satisfy all of the just claims, and the surety company therefore prayed for an order of court making lawful distribution of the amount of the bond among the parties severally entitled, including the claim of the United States. The circuit court held that it was within its equity powers to stay the action upon the bond until the United States consented to have the same legal question adjudicated in an equity case, where all having any claim upon the liability created by the bond could participate in accordance with equitable principles. The claim, therefore, was not an adverse claim to the Government, nor was any affirmative action asked against the Government. It was purely a question of procedure. The Government had invoked the arm of the court to obtain its rights, and the court recognized the pendency of another cause in which the relief prayed for by the Government could be lawfully obtained, and at the same time the rights of others respected. The stay in this case was, there-

fore, the familiar equity power of the court to prevent a multiplicity of suits, and is not analogous to the present case. A true analogy would exist if the surety company had asked that the Government suit be stayed unless the Government would consent to subject itself to an adverse suit, sounding in tort, by the surety company against the Government.

Appellants also cite, with a show of confidence, the case of the *Union Pacific Railroad Company* v. *United States* (2 Wyoming, 170), in which the highest court of that State held that where the United States had commenced an action of replevin and given its bond, that the court in determining the replevin case, could give judgment against the Government upon its bond. It is not necessary to determine in this case whether that decision was sound, for it is distinguishable from the case at bar by reason of the fact that the Government had given the bond, and under the Court of Claims act was, therefore, liable, and indeed suable, upon its contractual obligation. Congress, therefore, had expressly permitted recovery upon the bond given by the Government, and thereby waived the immunity from suit or from adverse judgment.

It seems hardly necessary to review the various other authorities cited by counsel for the appellant. None of them even remotely sustains appellant's contention. All of them are plainly distinguishable from the case at bar. Appellant himself seems to feel the weakness of his contention, for his real argument, as I understand it, is not that the cross libel was properly

filed, and not that process could be issued against the Government, and not that any adverse judgment could be rendered against the Government on the cross libel, but simply that the court had power to stay the Government's assertion of a legal right until it waived another and distinct right. In other words, the appellant, while apparently conceding that the cross libel is without legal justification, and that the process was properly quashed, yet contends that the court by granting a stay can not merely validate the void proceedings, but can practically grant a perpetual injunction against the Government from exercising its undoubted right to litigate, unless it surrenders a valuable immunity. Such a proposition is as extraordinary as it is novel, and is as mischievous in its possibilities as it is devoid of principle or authority to sustain it.

Respectfully,

JAMES M. BECK,
Assistant Attorney-General.

O